# UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

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THE HONORABLE LEE H. ROSENTHAL, CHIEF JUDGE PRESIDING

DWIGHT RUSSELL, et al.,

No. 4:19-cv-00226

Plaintiffs,

۷S.

HARRIS COUNTY, TEXAS, et al.,

Defendants.

# **HEARING**

# PROCEEDINGS HELD BY VIDEOCONFERENCE

OFFICIAL REPORTER'S TRANSCRIPT OF PROCEEDINGS

Houston, Texas

January 10, 2022

APPEARANCES:

For the Plaintiffs: Elizabeth Rossi, Esq.

Joseph Grinstein, Esq. Jeffrey Stein, Esq. Jeremy Cutting, Esq.

For the Defendants: Rachel Fraser, Esq.

Seth Hopkins, Esq. Murray Fogler, Esq. Suzanne Bradley, Esq.

Reported by: Nichole Forrest, RDR, CRR, CRC

Official Court Reporter United States District Court Southern District of Texas

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Proceedings recorded by mechanical stenography. Transcript produced by Reporter on computer.

# **PROCEEDINGS**

(The following proceedings held in open court.)
(The following proceedings also held by zoom.)

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THE COURT: Good morning. Good morning, everyone. I see a large number participants.

May I have appearances from all of those who will be speaking in today's hearing? And then those who will be simply observing, please also note your appearances.

I won't ask you how your weekend went. I know you were all busy reading and trying figure out application and ramification. Fortuitously, we had this hearing previously scheduled. I don't know how we knew. Trust me, we did not.

So let me have appearances and we'll proceed.

On behalf of plaintiffs.

MS. ROSSI: Elizabeth Rossi for the

plaintiffs.

THE COURT: Thank you.

MR. STEIN: Jeffrey Stein on behalf of

plaintiffs.

THE COURT: Thank you.

MR. CUTTING: Good morning, Your Honor. I am Jeremy Cutting. I recently entered a motion for admission pro hoc vice. I'm also with the plaintiffs, with Civil Rights Corps. I apologize, my Zoom doesn't have my full name at the moment.

THE COURT: I'm sure it will next time and you'll be admitted pro hoc vice. That is granted.

MR. GRINSTEIN: Joe Grinstein for the plaintiffs.

THE COURT: I see Mr. Manne.

MR. MANNE: Neal Manne for plaintiffs.

Good morning.

THE COURT: Good morning.

Anyone else for the plaintiffs?

All right. On behalf of the -- let's start with the sheriff and then the county and the others who are here on behalf of defendant or affected parties.

MR. FOGLER: This is Murray Fogler for the sheriff.

THE COURT: Thank you.

MS. FRASER: Rachel Fraser on behalf of

Harris County. Good morning.

THE COURT: Good morning.

MS. BRADLEY: This is Suzanne Bradley.

Unless the Judge has questions for me, I will not be speaking.

THE COURT: On behalf of whom?

MS. BRADLEY: The sheriff.

How are you, Judge?

THE COURT: Fine, thank you. Thank you for clarifying.

Anyone else for the sheriff?

Go ahead. Anyone else for the sheriff or the county?

MS. JONES: Yes, this is Veronica Jones on behalf of the sheriff.

As with Ms. Bradley, I don't believe I'll be speaking today unless need be.

THE COURT: I don't know. Thank you.

That's one of the issues we need to address.

Any other appearances, please?

All right. We have this opinion. We're not Dallas, but we're a lot like Dallas. And the Circuit was fairly broad in the En Banc Opinion on its reading of the governing provisions.

So we've already -- we have no claims against the district or felony Judges, but we have discovery issues as to them that are on appeal.

Is there anything we need to do with regard to that appeal other than continue to wait?

MS. ROSSI: This is Elizabeth Rossi for the plaintiffs. Your Honor, at this point, I would just ask for some additional time.

(All parties speaking simultaneously.)

THE COURT: (Indiscernible) in the interest of time --

MS. ROSSI: We're still getting together with our various teams on Russell to discuss the opinion and the implications.

You know, the core issues in this case are not affected by the standing and liability sort of threshold questions --

THE COURT: Well, we still have the question mark of the sheriff.

MS. ROSSI: Yes, Your Honor.

THE COURT: I think that's a big question mark.

MS. ROSSI: Yes, Your Honor. I don't want to speak prior to sort of having thought through carefully all of the implications.

So it would be helpful if we can return to the Court with answers to follow the questions that Your Honor has.

THE COURT: The problem is that I'm not yet sufficient -- I'm kind of where you seem to be and perhaps the parties representing the county and the sheriff and others are in the same position of not yet being sufficiently confident as to the impact of *Davies* to even figure out what our appropriate next steps ought to be in light of the pending appeal on the discovery issues and whether we need to address both traceability and redressability as to the sheriff and abstention given *Davies*, or, if those are not appropriately resolved at this stage, If we need to do anything to resolve those if they are appropriately resolved at this stage --

Don't hesitate to jump in, anybody, who has some guidance on those issues. I mean, I don't want to lose sight of the fact that we have a population in jail big enough now to require transfer of inmates to Louisiana.

MS. ROSSI: That's right, Your Honor. I just want to say we agree with you. And our goal throughout this entire litigation has been to move as quickly as possible on the merits so we can get a resolution on those most important core questions in this case.

And, you know, it's our view that addressing, you know, the constitutionality of pretrial

detention and the manner in which it's imposed and enforced will potentially affect the jail population and these issues that we're all here so deeply concerned about.

But I do think that we would be in a position to better advise the Court with some additional time and internal conversation.

THE COURT: I don't disagree that is appropriate.

So is the best way for us to proceed is to reconvene in one week, two weeks, you tell me, two weeks, to give you a chance, perhaps, to confer not obviously internally but with each other?

MS. ROSSI: I think two to three weeks would be helpful to allow those conversations to take place.

THE COURT: All right. In the meantime -- and I agree, I will set a date before we terminate this proceeding.

In the meantime, is there anything that we can helpfully do to -- the merits are not disposed of by *Davies*. The point is made forcefully that they are not resolving the substantive claims. These are procedural rulings, but they are obviously critical procedural rulings.

And I don't know if the parties intend to seek further relief not necessarily within the Circuit but beyond, or whether there is a Circuit split on some threshold issues that might attract attention at a different level. I just don't know. You'll tell me those things in two to three weeks when we reconvene.

In the meantime, is there anything helpful we can do? I did get the status report from the sheriff's office, as well as from Ms. Rossi. I appreciate both of those. I assume everyone has now seen them.

I'm trying to understand what the charge that the sheriff's office submitted really unpacked to mean; how many people are just waiting for hearings and how many are sort of stuck in a pre-transfer-out phase that seems to be prolonged?

Perhaps Ms. Jones or someone else from the sheriff's office can address those questions, just so we know where we are.

MR. FOGLER: Your Honor, this is Murray Fogler.

THE COURT: That's fine.

MR. FOGLER: As the Court has seen, the Texas Commission on Jail Standards has been busting after the county for quite some time because it was increasing capacity at the jail.

As a result of that, this temporary, hopefully temporary measure was instituted to employ this private jail in Louisiana for the transfer of potentially 500 of the lower-security inmates to Louisiana.

THE COURT: Those are the ones that were most likely to be bondable?

MR. FOGLER: Well, I don't know exactly whether they're the most likely to be bondable. But they are not the maximum-security folks that are continued to be may be maintained at the jail here.

As the sheriff has said all along, this is not just a jail problem; it is a criminal justice problem that is occasioned by the fact that the process has been slowing.

I'm sure that the Omicron spike has not helped at all. In fact, I'm sure it has exacerbated the problem and will continue to do so for the short term future.

THE COURT: I share your confidence in that observation, and I share your frustration that being correct in that observation doesn't help a bit.

So I do have one question to the person who is now the head -- who replaced Mr. Thiessen. Is that person on the conference call?

MS. ROSSI: That's Mr. Vinas. And it was

my fault for bringing him into this. And I don't know that he had notice of the hearing prior to the e-mail I sent. I can reach out and update him.

THE COURT: If you would. And if you would, as part of that outreach, as well as the people from the public defender's office, who I hope are on the call as well, whatever you can do to ask for hearings. The failure of lawyers appointed to ask for hearings quicker, if that's the right legal word, appears to be a factor in some of the slow processing of these decisions.

And to the extent voluntary action to be more active in associating hearings and ensuring they're docketed and occur would provide a practical, if not a formal or legal measure of improvement.

MS. ROSSI: Absolutely, Your Honor. I would be happy to talk with Mr. Vinas and Mr. (Video feed cuts out) and Ms. Wood about that.

I think what the three individuals we highlighted in our advisory really illustrate is that the same problems we have been talking about since March 2020 are continuing to occur.

You know, Mr. JVC is someone who has been in jail on a \$5,000 bond for over a year for apparently stealing a bottle of wine from a CVS. It's an individual who we understand his lawyer can't be reached, has failed

to set a hearing, and this is in Judge Kelli Johnson's courtroom. She has also failed to set any hearing to consider bail.

Mr. --

THE COURT: Who is his lawyer?

MS. ROSSI: His lawyer is Kenneth McCoy.

I know that the client advocate in the public defender's office, as well as myself, have attempted to reach out to him with no response.

And, you know, I think given that there are individuals like this, many of them who are in the jail, who are languishing because they can't reach their lawyer, they can't get to court. Because of COVID, people aren't even being transferred to court when court dates are set.

There is a culture of court settings being postponed time and time again for months -- at month-long intervals. You'll see the other individual, Mr. HL, was last in court in November, I believe, and his next court setting is in early March.

THE COURT: Does "in court" include by virtual or Zoom methods?

MS. ROSSI: Yes. It's my understanding when folks at least that are in quarantine in the jail -- counsel can correct me if I am wrong -- but even if

they're in quarantine they aren't appearing by Zoom.

But in any event, because there is this culture of setting and resetting so far out and having no conversations between lawyers and clients in the meantime, there is a total lack of urgency about moving these cases, setting discovery deadlines, ensuring that trials are happening.

And I don't think that this transfer of hundreds of people away from their families to Louisiana --

THE COURT: But that will not help that. Clearly, that will not help.

And hopefully this COVID surge will recede. It's predicted to -- this peak is predicted to peak in, generally not geographical region specifically, January 28.

MS. ROSSI: Hopefully --

(All parties speaking simultaneously.)

MS. ROSSI: There are so many other harms and devastating aspects of being in jail many, many hours away from one's family and one's lawyer and any hope of getting to court --

THE COURT: I know.

MS. ROSSI: -- even if there were no Omicron, we would be talking about the same issues in my

view.

THE COURT: To a certain extent, just casting public light on this and perhaps making more publicly known the failures of lawyers who are appointed and judges who are elected to do this work would help.

But let's wait until we have our next hearing to figure out the Court's appropriate role in this case, on this record, on these facts, in this procedural setting, what we need to do next, both long term and the short term, so we have a sense of an overall path to resolution that is respectful of the limits that the En Banc Court has imposed and conscious as well of the holes in the determinations that have to be filled in; figure out how best to do that accurately and yet officially.

MS. ROSSI: Absolutely, Your Honor. I completely understand. All of us do at this point. There are limits to what the Court can do in the context of talking about the jail population.

I did just want to point to one other thing as we're talking about the Louisiana transfers and the case backlog. And that is the dismissal rates. The dismissal rates and are very high for these cases including, quote, violent cases, and the conviction rates are very low for these cases.

I think this is just one of the reasons

that if lawyers and the Judges were more conscientiously moving cases and enforcing discovery deadlines and holding the district attorney's office's feet to the fire to prove these allegations that we would see a quick clearing of many of the cases in this backlog.

THE COURT: The U.S. Attorney -- it's the district attorney's office that has not been vocal in this hearing, and I'm not asking that they be.

But at one point, they were working pretty aggressively and helpfully to identify the cases where there was no objection to the release on some PR bond and moving those cases quickly.

I don't know what the status of that kind of effort is now, particularly with this uptick that has now been consistent over time in the number of people being brought in. I just don't know. And --

MS. ROSSI: I'm not aware of any lists that have been exchanged for many, many, many months now. It's my understanding this those efforts have completely halted.

THE COURT: I don't know why, because they did seem to be helpful.

So perhaps in the discussions you're going to have in next two weeks or so you could include the district attorney's office in those discussions and try to

reinstate the helpful non-ordered but encouraged measures to expedite the identification of those who are eligible for and should be released thereby easing -- not only accomplishing that goal but easing the population problems that are straining the jail and increasing the risk of disease.

I do credit the sheriff and the county for a rigorous effort to vaccinated the population. I'm aware that has been helpful. It is, of course, not seamless, particularly as you're bringing in new people all the time during an unprecedented search.

So I think what we need to do is just set a date --

MS. ROSSI: Quickly --

THE COURT: Yes.

MS. ROSSI: -- I apologize, Your Honor, for interrupting you. I recall that there is one very helpful thing that the Court could do specifically with respect to case management in Russell, which is relating to the discovery issues that we have raised late last year regarding the district attorney's office.

I'm going to actually, if it's all right, just hand it over to my colleague, Jeff Stein, who has been liaising with Mr. Nichols on those issues to just explain to the Court what update is and where we are --

THE COURT: That would be helpful.

(Both parties speaking simultaneously.)

THE COURT: Mr. Stein.

MR. STEIN: Good morning, Your Honor.

The update is: Since our last hearing on November 15, we haven't received any additional production from the district attorney's office. Mr. Nichols and I have -- were in communication leading up to the new year. We were told to hopefully expect some production of at least the manuals that the Court -- that we discussed with the Court -- to expect those before the holidays. We haven't received those yet. I understand that the office needs to do some work to get bond recommendation forms together.

But as we made clear, we would appreciate any production even on a rolling basis, especially because, although we're still waiting on confirmation from the district attorney's office about the date.

We've tentatively scheduled February 16 for the reopen deposition that was also the subject of the last hearing.

So once we get that confirmation from the district attorney's office, we'll have that set. My last communication with Mr. Nichols is that they now expect to produce everything by the end of January.

And I indicated, as long as we can get the production in January that should not impact the deposition dates, should not slow the case any further.

I just hope that we do not find ourselves, again, in a position where another month passes and we have not received the production.

THE COURT: What is it you're asking me to do, Mr. Stein?

I would like to hear from Mr. Nichols, but it sounds like you're simply putting on the record your position that a failure to get the materials by the end of January will likely lead to postponement, and you may seek more formal release.

Is that fair as to where we are?

MR. STEIN: In the interest of moving things forward, if the Court would just formalize the idea of the expectation in the form of an order that production will be by the end of January so we can continue moving forward.

I suppose that would be our request.

Otherwise, we are placing the current schedule on the record.

THE COURT: All right.

Mr. Nichols.

MR. NICHOLS: Good morning, Your Honor.

I'm kind of surprised we are even
discussing this, because I have an e-mail, which I'm happy
to read to the Court, if you need it --

THE COURT: I really don't need it.

MR. NICHOLS: I don't think you do.

THE COURT: My least favorite thing in the world is reading e-mail exchanges on discovery. And you guys are nice to each other.

(All partis speaking simultaneously.)

MR. NICHOLS: I detest the practice of having to, you know, talk about communications between counsel and so forth.

But I will represent to the Court that I have an e-mail that basically represents Mr. Stein's acknowledgment that we are planning to produce this material by the end of January and that we are working to get a date for the continuation of the notice of -- or the subpoenaed deposition of a corporate representative of the Harris County District Attorney's Office and --

I mean, we all know the Court's procedures. There has been no formal litigation of any motion to compel. There is no basis in which to ask the Court to enter an order at this point, but hopefully we are lawyers that try to live up to our word.

THE COURT: And I do not doubt that you

are precisely that.

I think that it is sufficient at this point, Mr. Stein, for me to acknowledge that the district attorney's office has committed to production by the end of January. That is to be more specific -- this is January 10. So we are looking at January 31st, production by then.

Mr. Nichols, if you can produce what you have on a rolling basis, so that if you have materials that can be produced now you can do so, and just complete your production by the 31st, that would be enormously helpful. And I urge you to do so.

Does that pose any problem?

MR. NICHOLS: Understood, Your Honor. And we have that production underway already.

THE COURT: All right. Very good.

And if you can do anything on the district attorney's side to more aggressively move the paperwork and if necessary work with opposing counsel or reach out to opposing counsel or even without -- set these cases on a docket so they can be moved, that would be very help as well. I mean, these are practical problems as much as just jurisprudential problems.

And everyone is aware that COVID is making this more complicated and it was not easy to begin with.

Anything further, Ms. Rossi?

MS. ROSSI: No, Your Honor.

THE COURT: Anybody else?

MR. NICHOLS: No.

MR. FOGLER: No.

THE COURT: All right. Thank you-all very

much.

Oh, date. Date.

How about January 31st? That way we will know the status of the production. You won't perhaps have had a chance to review it, but that will give you I think ample time to have discussions internally and externally on the impact of *Davies* and what makes sense to do next, what we ought to do with the pending appeal on the discovery issues and related questions.

Does that work?

MS. ROSSI: I see Mr. Manne nodding. And I know it works for the Civil Rights Corps counsel. So I think plaintiffs are good with that.

THE COURT: All right. Let's do it again at 10:00 or 10:30; which is better? I don't think we have anybody on California time zone. It's all Eastern.

So is 10:00 all right with everyone? We can do it again by Zoom since we do have out of state lawyers.

MS. ROSSI: That's fine.

THE COURT: Thank you-all.

I hope you are all boosterized as well.

Good luck.

(Proceedings concluded.)

# TELEPHONIC OR VIDEO CONFERENCE CERTIFICATE

I, Nichole Forrest, RDR, CRR, CRC, certify that as an Official Court Reporter in the United States District Court, Southern District of Texas, I have transcribed the telephonic/video conference hearing of the foregoing entitled case to the best of my ability; that any indiscernible designations are because of audio interference that precluded me from understanding the words spoken; and that the foregoing typewritten matter contains a full, true and correct transcript of my understanding of the aforesaid proceedings as recorded to the best of my skill and ability.

Certified on January 29, 2022.

/s/ Nichole Forrest Nichole Forrest, RDR, CRR, CRC

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